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SUPREME COURT OF THE UNITED STATES

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R. H. CROWLEY,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 1194

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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, R. H. Crowley, prays a Writ of Certiorari to review the decision and judgment of the Court of Claims entered November 5, 1945, awarding judgment to petitioner in the amount of $5,540.07 (R. 31) and denying petitioner's claim for judgment in the amount of $50,328.76. Petitioner seasonably filed a motion for a new trial which was overruled on February 4, 1946 (R. 31).

Question Presented

The question is whether or not provisions in a government contract relating to the finality of the decision on questions of fact by a government inspector, similarly worded and with obvious similar intent, may be so construed that identical action may be held as arbitrary and unreasonable under some of such provisions and not under the others.

Statement

The petitioner on May 17, 1940, entered into a written contract with the defendant represented by the Chicago Quartermasters Office of the War Department whereby the petitioner in consideration of $115,625.00 agreed to furnish all labor and materials for the construction of 150 prefabricated buildings for use in Civilian Conservation Corps camps, F. O. B. Spokane, Washington, in accordance with specifications and schedules.

On May 13, 1940, petitioner was telegraphically advised of the award, and on May 14, 1940, a letter confirming the telegram dated May 13, 1940, was mailed to petitioner advising that the contract would bear date of May 17, 1940, and provided for completion on or before June 17, 1940 (R. 12-13).

Petitioner, upon receipt of the telegram of May 13, 1940, started performance of the work by setting up the necessary machinery and employing labor for the project. Much of the machinery had been used by petitioner on previous CCC contracts upon which he had worked; the mechanics and some of the carpenters needed on the instant contract were recruited from men who had worked on similar projects and were experienced in this work (R. 15).

Contracts were immediately let for about 75% of the lumber to be used on this project and was bought in accordance with the contract and specifications, and was in the grades called for in the specifications. A substantial quantity of the lumber was delivered by truck on the day the formal contract was signed and the balance was delivered as the contract work progressed (R. 15).

The Resident Engineer who was to inspect the job arrived at petitioner's plant on May 26, 1940, nine days after the commencement date of the contract, and after about one-third of the contract time for completion had expired. He

was experienced as a lumberman in working with the type of lumber that is used in the Southeast States, but his experience was limited as to the types used on the instant contract. He had two assistants. One of these had no experience with the types of lumber required by the specifications; the other had no qualifications as an inspector (R. 21).

Petitioner, on the other hand, was not only an experienced lumberman, he was highly experienced in the prefabrication of lumber and the identical type of prefabrication called for by the contract, namely, the prefabrication of CCC camps (R. 15).

Performance of the work required by the contract necessitated the making of certain templates or forms to be used in the fabrication of panels. Petitioner employed for this purpose an experienced mechanic who had made templates and forms for previous similar contracts on which petitioner had been employed.

Certain of the forms for fabrication of panels had been completed and petitioner was completing the form for the floor panels, constructed of steel angle bars according to specifications and petitioner's previous experience on similar contracts at the time the Resident Engineer arrived to inspect the job. Defendant's Resident Engineer refused to accept the forms for floor and roof panels on the ground that they were not heavy enough and petitioner, in order to meet the requirements of the inspector, then had forms made of channel irons which were unsatisfactory and resulted in many panels being damaged and wasted in their removal from the forms (R. 18).

The Court of Claims found that the Resident Engineer in requiring the change in forms, upon his belated arrival at the plant, caused four days' delay in petitioner's operations.

Prior to the arrival of defendant's Resident Engineer, whose duties included the inspection and approval of material and fabrication, substantial progress had been made in contract operations, but in compliance with the provisions of the specifications, petitioner did not proceed, except in a limited way, with actual fabrication pending arrival of defendant's Resident Engineer. Upon his arrival there was a large quantity of lumber on hand at petitioner's plant, including finished flooring, subflooring, roof sheathing, all cut to exact lengths, 2x8's, sill stock and truss members and lumber for flooring and siding (R. 19). The Resident Engineer rejected a large amount of this lumber although it had been bought according to specifications and was sound and suitable for the purpose intended (R. 19).

The rejection of so large a quantity of the lumber as described, and the requirement that lumber of better quality be used, caused petitioner to provide a crew of two or three men, who spent their time in the particular work of cutting the lumber to remove the objectionable knots at additional expense, waste of lumber, and material delay in performing the contract work. Petitioner, in view of the quantity of lumber to which the Resident Engineer objected, purchased lumber of a higher grade than he had on hand, in order to save his contract time and prevent further waste. This caused considerable additional expense as well as occasional idle time of machines and labor, lasting an hour or more on several occasions, while waiting for lumber (R. 20).

In addition to rejecting suitable lumber the Resident Engineer insisted upon removal of permissible defects by cutting operations, all of which resulted in waste and increased costs to the petitioner.

Rejection of suitable lumber and insistence upon cutting operations was a course of conduct which was consistently adhered to by the Resident Engineer through the entire

time he was inspecting the job; conduct which the Court of Claims in Special Finding of Fact No. 23 (R. 28) found was unreasonable.

With respect to many fabricated items the Resident Engineer waited, in many instances, until these items were fabricated and lined up for loading in cars and made his objection there, necessitating the taking apart and rebuilding or repairing of panels, which resulted in duplication of work, waste of lumber, and additional expense (R. 20-21).

On June 12, 1940, petitioner protested to the Chicago Quartermaster Depot against the actions of the inspector in rejecting the forms which petitioner had made, and in requiring the use of a better grade of lumber, which he termed arbitrary, and requested an extension of two weeks' time in which to complete performance of the contract. This request for extension was denied by letter from the Chicago Quartermaster Depot dated July 5, 1940 (R. 24).

The work was completed on July 13, 1940, and petitioner was paid sums aggregating $99,331.89, being the contract price of $115,625, less discount of $2,312.50, freight adjustment of $1,889.44 and liquidated damages in the amount of $12,091.17 for failure to complete within specified time (R. 24, 25).

On August 7, 1940, petitioner filed with the Quartermaster General a claim in the amount of $39,999.86 for extra labor and material furnished on demand of the inspector and remission of liquidated damages, which was rejected on November 8, 1940, by the Contracting Officer, who made findings of fact (R. 24).

Further protests were made to the War Department and on March 4, 1941, the Director of Purchases and Contracts, acting on behalf of the Secretary of War, issued a memorandum dealing with the appeal from findings of fact under this contract under which it was recommended that nine days' extension of time should be allowed to the contractor

due to the late arrival of the Resident Engineer, and that a credit of $336.91 should be allowed the contractor for the excess costs alleged to have been incurred by him in the procurement of mess table tops (R. 25).

On August 6, 1941, settlement of petitioner's claim issued from the General Accounting Office, on his claim for liquidated damages, expenses incurred for extra materials and labor, excessive waste of materials and additional overhead expenses alleged to have been incurred in the performance of the contract. Under this settlement petitioner's claim was disallowed in the amount of $34,459.79, and allowed in the sum of $5,540.07. The allowed portion of the claim represented the excess costs which were claimed in connection with table tops in the sum of $336.91, and remission of liquidated damages for nine days' delay in delivery, which were admitted to be due to the late arrival of the Resident Engineer. However, payment of the allowed portion of the claim, namely, $5,540.07, was suspended for reasons not now material, as the Court of Claims awarded judgment for that amount.

The petitioner then sued in the Court of Claims for the amount of $50,328.76 which he alleged was due to him by reason of excess costs for extra material and labor, furnished on demand, for improperly assessed liquidated damages and for demurrage and loss of profits, all of which were claimed to be due because of the continued unreasonable action on the part of the Resident Engineer (R. 5).

That Court made extensive Findings of Fact and computed the amount of liquidated damages assessed against petitioner for delay for which he was not responsible at $10,019.62 (Special Finding of Fact No. 36, R. 26). In Special Finding of Fact No. 37 (R. 27) it computed petitioner's excess costs of material and labor to be $15,311.83.

The Court entered judgment on November 5, 1945, for petitioner in the amount of $5,540.07 which had been found to be due by the War Department. In limiting judgment to

this amount the Court held that the Resident Engineer in his inspection of the work had been rigid, extreme and had taken unreasonable action and that under two clauses of the contract his action had been so unreasonable as to amount to legal bad faith. The Court held, however, that under two other provisions of the contract whereby the petitioner had agreed that the Resident Engineer should be the sole judge of certain questions of fact that the Court was "unable to hold that the action of the Resident Engineer was so arbitrary as to imply legal bad faith," citing *United States* v. *Gleason*, 175 U. S. 588, 602 (R. 36).

Reasons for Granting the Writ

The decision of the Court of Claims carries to an unreasonable extreme the doctrine of the finality of the judgment of government inspectors. It holds, in effect, that irrespective of lack of qualifications or of a fair approach to the problems involved, that the inspector's judgment is final, that the contractor must be burdened with the increased costs resulting from such erroneous final judgment and that the Courts are powerless, because of but one contract provision, to award judgment to the contractor for the amount of such increased costs.

We submit that this is erroneous and that correct doctrine as developed by this Court is that the judgment of a government agent is final only when fairly and advisedly exercised, and that where, as here, that judgment has been exercised in a rigid, extreme and unreasonable manner the government must respond in damages for the resulting increased costs to the contractor.

It is in the public interest that this Court review the case and correct the judgment of the Court of Claims.

Wherefore, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Court of Claims in this case be granted.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1194

R. H. CROWLEY,

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vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Claims is reported in 62 Fed. Supp. 887. It is on pages 27 to 30 inclusive of the record.

Jurisdiction

The judgment of the Court of Claims was entered on November 5, 1945. Motion for a new trial was filed by leave of Court on January 10, 1946, and was overruled on February 4, 1946.

This Court has jurisdiction under the Act of February 13, 1925, C. 229, Sec. 3, 43 Stat. 939, 28 U. S. C., Sec. 288.

Statement

Statements of the question presented and of the facts in this case are in the petition (Petition, *ante*, pp. 1-7).

Specification of Errors to Be Urged and Summary of Argument

The Court of Claims erred in construing the contract between petitioner and respondent. The Court had under consideration four clauses of the contract, all of which were similar in wording and intent. The Court, however, construed two of the said clauses as requiring a certain standard of conduct on the part of the Resident Engineer in charge of the work and the other two as permitting a different standard of conduct. It held, in effect, that he might be unreasonable and arbitrary under two provisions of the contract but could not be under the other two.

Petitioner contends that such a decision is wholly erroneous and that because of the similarity of the four clauses of the contract they should have been similarly construed. *United States* v. *Rice,* 317 U. S. 61.

The only case cited by the Court of Claims in support of its decision, *United States* v. *Gleason,* 175 U. S. 588, is not authority for the conclusion reached and is clearly distinguishable from the instant case. In the *Gleason* case there was neither pleading, proof nor finding of unreasonable action by the Resident Engineer; in this case there was not only pleading and proof of unreasonableness, there was a definite finding thereof.

ARGUMENT

Point I

The four provisions of the contract relating to the finality of the decision of the resident engineer are similar in word and intent, were intended to accomplish the same purpose and should be similarly construed.

The decision of the Court of Claims turns upon the construction of the contract between petitioner and respondent

and more narrowly upon the question of whether provisions inserted to accomplish the same purpose, and similarly worded, should be similarly construed.

The four provisions are Article 12 of the Contract, paragraph SC-5 of the Specifications and Specifications No. 2, Section 1, paragraph 2A and paragraph SC-6 of Specifications CCC No. 2.

The Court of Claims summarized Article 12 and SC-5 as follows:

> "Article 12 of the contract makes the action of the contracting officer on disputed questions of fact final, subject to appeal within 30 days to the head of the department. The specifications, SC-5, make final the interpretation of the drawings and specifications by the resident engineer, subject to appeal within 30 days to the head of the department" (R. 29).

The relevant part of Specifications No. 2, Section 1, paragraph 2A reads as follows:

> "Irrespective of grading rules quoted, any materials having defects that would be obviously detrimental, either to the construction or for the use for which it is intended, will not be accepted in fabricated materials."

Specifications CCC No. 2, SC-6, insofar as relates on this controversy reads:

> "• • • In all cases where an article is mentioned in the specifications in connection with the words "best quality", "approved quality", or "equal to", the Resident Engineer shall decide what is the best quality and most suitable article to use, subject to appeal provision included under paragraph SC-5, above."

The Court of Claims said that if the first two provisions were the only ones involved, the Court "would be inclined to hold that the action of the engineer in charge was so

clearly erroneous as to imply legal bad faith." The Court of Claims then quotes the other two provisions and says:

> "These provisions, to which plaintiff agreed, make the question of the quality of the materials one of fact, to be determined by the resident engineer. In the light of the plain provisions we are unable to hold that the action of the resident engineer was so arbitrary as to imply legal bad faith."

This language of the Court imports into the contract distinctions which are not there. Each of the four provisions deals with questions of fact and the authority of the resident engineer to determine those facts.

Article 12 of the contract states that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer" with the usual provisions relating to appeal.

SC-5 which makes provision for the Resident Engineer to be the "interpreter" of the intent and meaning of the drawings and specifications contains the 30-day appeal provision.

Specifications No. 2, Section 1, paragraph 2A deals with defects "that would be obviously detrimental." Certainly the question as to whether or not such defects would be obviously detrimental is a question of fact.

Finally Specifications CCC No. 2, SC-6, in conferring upon the Resident Engineer the power to decide "what is the best quality and most suitable article to use" subject to appeal, conferred upon him the power to decide questions of fact.

All these provisions relate to the decision of questions of fact. By their very wording it is obvious that all were written into the contract for one purpose: to place the authority to decide inevitable disputes in some person in order that a ruling might be made and the progress of the work

be not hindered by prolonged disputes. This authority, however, is not an absolute authority to make final decisions. Decisions made under that authority are final only when made advisedly, reasonably and with full consideration of the rights of both parties. *Ripley* v. *United States,* 223 U. S. 695, 702.

The Court of Claims, however, holds that under two articles of the contract the Resident Engineer's authority is absolute, irrespective of the manner in which it is exercised.

The Court said:

> "These provisions, to which plaintiff agreed, make the question of the quality of materials one of fact to be determined by the Resident Engineer" (R. 30).

We do not dispute the correctness of this statement. We submit, however, that such a statement does not decide the case; that such a statement is equally correct and applies with equal force to the other related contract provisions. The petitioner agreed to those provisions no less than to the ones upon which the Court of Claims relies and all of them govern the decisions of questions of fact.

The principle that similar provisions in government contracts should be construed in the same way is well illustrated by the decision in *United States* v. *Rice,* 317 U. S. 61. One of the questions there was the interpretation of Articles 3 and 4 of the contract in question. Article 3 governed the procedure under which alterations in the specifications could be made for general causes; Article 4 governed the procedure under which the government might alter the contract to meet unanticipated physical conditions. Both clauses essentially provide that if changes were made affecting an increase or decrease of cost of affecting the length of time of performance, an equitable adjustment should be made.

In disposing of the question the Court said through Mr. Justice Black:

> "Clearly questions of interpretation in clauses so similar should, if possible, be resolved in the same fashion in each of them." (317 U. S. 61, 67.)

That rule should be applied here. That the action of the Resident Engineer was so clearly erroneous as to imply legal bad faith was the decision of the Court of Claims. That action was taken in deciding questions of fact and it applies to decision of all questions of fact which he had primary authority to decide, irrespective of various contract clauses conferring that authority.

Point II

United States v. Gleason, 175 U. S. 588, Does Not Support the Decision of the Court of Claims

The Court of Claims relies on *United States* v. *Gleason*, 175 U. S. 588. The *Gleason* case, however, is not authority for the conclusion reached by the Court of Claims. It is true that in that case this Court held that where the question as to granting extensions of time was committed to the Resident Engineer in charge that his decision as to whether or not such extension should be given was final, but in that case the question of unreasonableness and arbitrariness was not sufficiently alleged or proved to form a basis for the contention of the contractor that the action of the Resident Engineer had been arbitrary and unreasonable in denying the contractor further extensions of time. The Court in its opinion on page 608 states that the allegation as to unreasonableness "was wholly insufficient on which to base an attempt to upset the judgment of the Engineer," and on the same page further found that there was neither evidence nor a finding based on evidence which would have sustained a stronger and more adequate

allegation than that which was contained in the petition. In this case, however, there was pleading, proof and finding of unreasonableness.

That the Court of Claims should have overlooked this very clear distinction between the *Gleason* case and the instant case is puzzling. It is difficult to see how it could be unmindful of the many cases in its reports and in the reports of this Court which clearly hold that the action taken by a Resident Engineer where his judgment is final is binding upon the contractor only in the absence of allegation and proof of unreasonableness or inexperience so gross as to amount to legal bad faith. The principles which govern the conduct of an inspector in such circumstances are as stated by this Court in the case of *Ripley* v. *United States,* 223 U. S. 695. The Court there said on page 701 and page 702:

> "But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised not capriciously or fraudulently, but reasonably and with due regard to the rights of both the contracting parties. The finding by the Court that the inspector's refusal was a gross mistake and an action of bad faith, necessarily, leads to the conclusion that the contractor was entitled to recover the damages caused thereby."

It is this decision and this principle which should have been followed in this case.

The holding of the Court of Claims is tantamount to saying that a Resident Engineer on a government contract may under one provision of such a contract which makes his judgment final take any action which he sees fit and the contractor is helpless, although under similar clauses of the same contract the Resident Engineer's action must meet the test of fairness and reasonableness. Such a conclusion is not supported by any decision of the Court of

Claims nor of this Court. Such a construction of the contract in question is wholly unwarranted, is against the established rules for the construction of contracts and the Court of Claims gave no reason for so construing the contract nor cited any cases in support of such a construction. It works an obvious injustice upon one without fault by a rigid, technical distinction which is without validity when the contract is considered as a whole.

Conclusion

The decision of the Court of Claims is erroneous. The writ of certiorari should be granted and upon a final hearing the judgment of the Court of Claims should be reversed.

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